

REPORT

—OF—

COMMITTEE ON COMMON.

M A R C H, 1887.

SOUTHBOROUGH, March 22, 1887.

The Committee chosen by the town to protect the town fences and other property on the common, in Southborough, and to employ counsel and to do all other things which they may deem proper and expedient thereto, have attended to that duty, and report as follows :

They invited the Prudential Committee of the parish known as the Pilgrim Evangelical Society to meet and confer with them, with a view to a better understanding of the respective claims of the town and the parish as to the rights of each, if any, in the common land near the meeting-house and the town hall, with the hope that such a conference might lead to some agreement that would satisfy both parties and restore harmony, but the claims of the representatives of the parish were so absolute and exclusive that this effort proved fruitless.

The Committee then searched the records of the Towns of Southborough and Marlborough, hoping to find something that would lead to a solution of the difficulty. After several days' search they were fortunate enough to find, in the town clerk's office in Marlborough, a record of the original grant by the proprietors, in the first volume, marked "Lay-

out of Lands," page 294. At the fourth adjournment of a meeting, held at the meeting-house in Marlborough on the twentieth day of December, 1727, the following language occurs: "At ye motion of John Woods and William Ward, "proposed that three acres of land, lying where Southborough "meeting-house is raised, as surveyed by William Ward, be "granted and set apart for accommodation for a meeting- "house, for a burying-place, and for a training field forever. "Voted in the affirmative, as before proposed, the day of ye "date above. Attest, WILLIAM WARD, *Moderator.*"

On the same page, is the plan laid out in nearly a square, marked twenty rods on three sides and twenty-four rods on one side; the Committee presume that by a merely clerical error one of the sides marked twenty should have been marked twenty-four, as that would have given just the three acres granted. Inside of the plan, as marked out, are these words: "plan of three acres laid out where South- "borough meeting-house stands," and below it as follows: "December 19, 1727, surveyed by William Ward."

This seems to be so conclusive and so important that the Committee caused the page aforesaid (294) to be photographed, and they herewith submit the copy as a part of their report.

The Committee then employed F. P. Goulding, Esq., of Worcester, as counsel, to investigate and give his opinion in regard to the respective rights of the town and the first parish, or their representatives, and they herewith submit a copy of his written opinion as follows:

WORCESTER, MASS., August 9, 1886.

JOSEPH BURNETT, ESQ., AND OTHERS,

Committee of the Town of Southborough.

Gentlemen,—In relation to the respective rights of the Town of Southborough and the Pilgrim Evangelical Society, in the lands surrounding the meeting-house, claimed to be owned by said society, and especially in the lands on which the Soldiers'

Monument stands, and which was fenced in by the town about 1866, I have examined the ancient records of the town, and copies of the records of the proprietors of Marlborough relating thereto, sufficiently to form an opinion which may be regarded as the final judgment I shall arrive at, unless something should be shown from those records which I have not discovered, and which, from the records already examined, I do not think likely to exist.

Assuming what would appear to be a matter open to some question, that the land fenced in about the monument was a part of the original common, the history, in brief, appears to be this :

The inhabitants, on November 25, 1727, finally settled upon the place for their meeting-house. The place determined upon was common land near where a clearing had already been made for a burial place. They raised the frame of the building forthwith. On December, 1727, they voted that "Wm. Ward, Lieut. Bellows and John Woods take a survey of the three acres of land in the corner of the ways where the land is cleared for the burying place, and where the meeting-house frame is raised for the accommodation of the meeting-house, and for a training field and for a burying place, and present the same to the proprietors of Marlborough for acceptance "

This survey was made and presented to the proprietors of Marlborough, and on December 20, 1727, the proprietors voted on "Motion of John Wood and William Ward that three acres of land lying where Southborough meeting-house is raised, as surveyed by Wm Ward, be granted and set apart for accommodation, for meeting-house, for a burying place, and for a training field forever."

So far as I know the paper title to the land in question is contained in the foregoing votes. I am not aware that the town, before the separation of its municipal functions from its parochial functions, ever undertook (if it had the power) to impress a different character upon the land from that which it received by force of the grant. The common or training field, which was of ample size, was evidently regarded as the property of the town, to be devoted to such public uses as were not inconsistent with the objects to which it was originally dedicated. In 1730 a pound was built in the corner between the paths southeasterly of the meeting-house. In 1753 the pound was rebuilt of stone, and it

was subsequently removed to another place on the common or training field.

In 1732 to 1734 a town school-house was built at the crotch of the two ways by the pound. At divers times the town granted to individuals the right to set "stables" or horse-sheds on the land, under various restrictions. In 1741 the bounds of the burial place were set, and a line run which "is to divide between the training field and the burying place."

During all this time the land remained open; a highway crossed it from north to south, and probably, also, from east to west, on the southerly side. It was used for a public training field, for games and sports, and for all the uses to which a public common is ordinarily put.

The meeting-house originally built was, in time, supplanted by another, standing somewhat northerly of the old one, and the "stables" or horse-sheds occupied parts of the land. Upon the separation of the municipal from the parochial functions of the town, the Religious Society, which had worshipped in the town's meeting-house was duly organized as a parish, and became the first parish. As such, it undoubtedly became the legal successor to the town, in the title to such property as had been by original grant, or by clear vote of the town respecting its own property, appropriated to distinct parochial uses, and continued in such uses until the separation. The rule is well settled by many adjudications, and in a leading case is expressed as follows:

"If land is specially granted to a town thus acting in a double capacity, either for municipal or parochial use; or, if such town, by vote or significant act, dedicates and appropriates a portion of its own territory to either one or the other use, and it so remains until the separation, it will vest in the town or parish, respectively, according as it shall have been originally so given or subsequently appropriated to parochial or municipal uses." It is clear, I think, that this land was not originally granted to uses exclusively parochial. It was granted for accommodation for a meeting-house, for a burial place, and for a training field. The order of the words can have no significance, and under the statutes of the province and state, two of the uses were distinctly municipal and not parochial. And the subsequent use was according to the original grant, so far as the present question is concerned. Whether or not a question might have been raised

as to the school-house and pound upon a strict construction of the grant, certain it is that the town put the same construction upon the term "training field" as a hundred other towns did, and there can now be no question that the municipal uses to which the land was devoted were as legitimate as the parochial.

True it is that in 1838 and 1840, after the first parish was organized as a separate corporation, it assumed to have such rights in the land that it gave the town a quit-claim deed of a lot of the land sufficient to build a town-house upon.

Whatever was the reason for this transaction, it did not create or enlarge any rights of the parish. The title of the town and the title of the parish were fixed before that grant. The act is entirely consistent with the theory that a question might be raised whether the erection of a town-house in the immediate vicinity of the meeting-house might not be an infringement upon the right of the parish to maintain its meeting-house for public worship. It by no means imports that the parish or the town thought the former owned the fee. But even if it were otherwise, it is a transaction that does not affect the legal title.

I am of the opinion that the first parish, by force of the original grant, as well as by the subsequent use, got a right of accommodation for its meeting-house. That is to say, it had the right to erect its meeting-house and maintain it, substantially in the place it was originally erected; to erect and maintain sheds and the usual buildings convenient and proper in connection with its meeting-house; the right to go to it and come away from it as its members have usually done. This right is concurrent with the right of the town to devote the residue of the common to such uses as, from time immemorial, towns in this commonwealth have devoted their training fields and commons to. The present inquiry is whether it was competent for the town in 1866 to erect a Soldiers' Monument upon a part of this public land, and adapt a portion of the same to this purpose, and erect and maintain a suitable fence, partly to protect the monument and adjacent grounds, but in no way interfering with the customary and legitimate enjoyments, by the first parish, of its meeting-house.

I am of opinion that this action of the town was entirely in conformity with its legal rights. I think the legal title of the land is in the town, as the principal corporation to which it was granted, subject, of course, to the right of the first parish to use

it for the purposes of its meeting-house, to the extent and in the manner it was before the separation of the several functions of the town, appropriated to parochial uses.

I have not sufficiently examined to give a definite opinion upon the question, whether the peculiar interest in the land which the first parish acquired as the successor to the town in parochial affairs, could be effectually conveyed to the Pilgrim Evangelical Society as was undertaken in 1857. That is, in my judgment a question not free from doubt. The statutes of the Commonwealth provide under what circumstances and for what purposes parishes may sell their meeting-houses. Gen. Stats. ch. 30, sec. 35, 36; Pub. Stats. ch. 38, sec. 22, 36, 37.

I doubt whether a parish deriving title, as this first parish did to the meeting-house and appurtenances, could alienate them to another corporation in no way its legal successor. The old parish by no means became merged in this society, or has any relation to it, unless as grantee. The old parish continued to exist for many years, and may be legally extant to-day. It may, perhaps, be held that inasmuch as the uses to which the new society were by the grant to devote the property were precisely similar to the old uses, that there was no legal restraint imposed upon such an alienation.

I will not give an opinion upon the question, inasmuch as I understand the town have no disposition to raise it, unless forced to in defence of its own just rights.

From all the foregoing I give my opinion as follows:—

First. The town had a right to erect the monument and fence in the manner it has done.

Second. The act of the persons who removed the fence was a trespass, whether they acted upon their own motion or under the authority of the Pilgrim Evangelical Society.

Third. I think the most convenient way to raise the question in court, is by a suit against such parties at law as for a trespass.

I have not deemed it necessary to refer to the circumstance, that the common, including the burial-ground, seems to include a good deal more than the original three acres, but as I stated in the beginning, assumed for the purposes of the discussion, that the whole of the land in question was covered by the original grant.

Yours truly,

FRANK P. GOULDING.

The Committee also repaired and renewed a part of the fence on the north side of the enclosure, where the Soldiers Monument stands, substituting iron for wood, slightly changing the line in the centre, and making it altogether a stronger and better fence.

They also caused the common, so called, to be carefully surveyed and a plan of the same to be made, giving meets and bounds; by this plan it appears that the lot known as the common contains five acres, three quarters, and nine rods, very nearly six acres, while it appears that only three acres were originally granted. The Committee have not been able to find when or from whom came this large addition.

They have carefully studied the matter, and have endeavored to locate, as near as possible, the original grant; in doing this it seemed to them that the old burying-ground must be mostly on the original grant, for if it commenced on the westerly side of what is now the common, very little of the burying-ground would be included; they therefore selected the southeast corner of the said burying-ground, and run a line northerly on the east side, parallel with the wall, as it now stands, twenty-four rods, thence westerly twenty rods, thence southerly twenty-four rods, thence easterly twenty rods, to the place of beginning.

In this measurement they allowed a strip two rods wide on the east side of the said burying-ground, for what was evidently an old roadway, that has probably at some remote time been taken into said lot.

If in thus locating the original grant the Committee are substantially right, and they believe that a full and fair consideration of the subject can lead to no other conclusion, then it follows that the points or parts *not included* in that grant must be as follows:

A strip two rods wide on the easterly side of the burying-ground and a small strip on the northerly end of the same.

An irregular piece northwardly of the hearse-house.

A strip about one hundred and twenty-five feet wide on the whole westerly side of the common.

The whole of the southern enclosure where the Soldiers' Monument stands, and a portion of the public highway on the north side of said enclosure.

A plan drawn by Dexter Newton, Esq., showing this location is submitted as a part of this report.

The Committee have not undertaken to define the exact rights of the town or the parish, but they refer to the written opinion of the eminent counsel employed by the town as a fair and conservative exposition of the facts in the case.

There seems to be no room to doubt the full rights of the town in the land upon which the monument stands and that upon which the fence has been erected, and the Committee recommend that the whole matter be referred to the selectmen, with instructions to protect the interest of the town in this property, but with power to settle by agreement with the parish any question in controversy.

Respectfully submitted,

JOSEPH BURNETT,
CHARLES F. CHOATE,
HIRAM E. COOK,
WM. H. BUCK,
A. D. HOWE, } Committee.